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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Burnden Holdings (UK) Limited

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Serial No. 78269045

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J. Scott Evans of Adams Evans PA for Burnden Holdings (UK) Limited.

Nelson B. Snyder III, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

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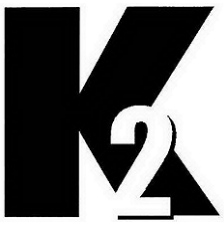
Before Quinn, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Burnden Holdings (UK) Limited to register the mark shown below,



for the following goods:

> metal building materials, namely, soffits and fascia; conservatory glazing systems consisting of metal greenhouse frames; metal window frames;

metal gutters; metal eaves beams and metal ridge beams; glazing bars and replacement parts for all the aforesaid goods in Class 6; and

non-metal building materials, namely, soffits and fascia; building materials, namely, decking and particle boards; pre-fabricated greenhouses; conservatory glazing systems consisting of non-metal greenhouse frames; plastic window frames; non-metal gutters; plastic eaves beams and plastic ridge beams; wooden glazing bars; non-metallic decorative trims for conservatories, namely finials; and replacement parts for all the aforesaid goods in Class 19.[1]

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark shown below,

for "non-metallic building materials, namely, windows and doors,"[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

[1] Application Serial No. 78269045, filed July 1, 2003, based on an allegation of a bona fide intention to use the mark in commerce.
[2] Registration No. 2,652,417 issued November 19, 2002.

The examining attorney maintains that the registered mark is dominated by the term “K2” which is identical to the entirety of applicant’s mark. Thus, the examining attorney argues that the marks are similar. As to the goods, the examining attorney finds that the individual building materials listed in applicant’s identification of goods and the windows and doors listed in registrant’s identification of goods are related products. The examining attorney argues that consumers are likely to believe that applicant’s building materials and registrant’s windows and doors originate from the same source.

Applicant, in urging reversal of the refusal to register, argues that its mark is distinct from the mark of registrant which includes a mountain design and the additional word MIKRON. As to the respective goods, applicant argues that they are very different in nature and that they travel in different channels of trade to different classes of purchasers. Applicant maintains that its goods are modular kits for adding a sunroom or conservatory to a building whereas registrant’s goods are windows and doors. Further, according to applicant, it sells its goods through retail channels to consumers, whereas registrant sells its goods directly to qualified

window and door installers only. In this regard, applicant submitted printouts from registrant's Internet homepage. Further, applicant argues that the purchasers of registrant's goods, i.e., qualified window and door installers, are sophisticated purchasers with specialized skills and equipment.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We consider first the respective goods. The question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods

or services actually are. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Applicant's goods are identified as follows:

> metal building materials, namely, soffits and fascia; conservatory glazing systems consisting of metal greenhouse frames; metal window frames; metal gutters; metal eaves beams and metal ridge beams; glazing bars and replacement parts for all the aforesaid goods in Class 6; and
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> non-metal building materials, namely, soffits and fascia; building materials, namely, decking and particle boards; pre-fabricated greenhouses; conservatory glazing systems consisting of non-

> metal greenhouse frames; plastic window frames; non-metal gutters; plastic eaves beams and plastic ridge beams; wooden glazing bars; non-metallic decorative trims for conservatories, namely finials; and replacement parts for all the aforesaid goods in Class 19.

Although applicant argues that its goods are "complete modular kits for adding a sunroom or 'conservatory' to a building," its goods are not identified in this manner. (Brief, p. 16). Rather, as pointed out by the examining attorney, applicant's identification of goods contains a list of individual building materials, one of which is "pre-fabricated greenhouses." In our likelihood of confusion analysis, we must consider the goods as set forth in the identification of goods. Moreover, in the absence of any limitations as to channels of trade and purchasers, we must presume that applicant's goods will travel in all the normal channels of trade for goods of this type, e.g., building supply stores, and that such goods are available for purchase by all the usual purchasers, e.g., building contractors, handymen, and do-it-yourself type homeowners.

Because registrant's windows and doors are identified without limitations or restrictions, we must presume that they also travel in all the normal channels of trade for goods of this type, and that such goods are available for purchase by all the usual purchasers. The channels of

trade for windows and doors would include stores that specialize in these products, as well as building supply stores, and the purchasers would include building contractors, handymen, and do-it-yourself type homeowners. Thus, for purposes of our likelihood of confusion analysis, the channels of trade and purchasers for the involved goods are overlapping. Indeed, in a building construction or renovation project, an individual may well purchase any one or more of applicant's types of goods and windows and doors.

To establish a relationship between applicant's various building materials and registrant's windows and doors, the examining attorney has submitted copies of third-party registrations for marks that cover one or more of the building materials listed in applicant's identification of goods, on the one hand, and windows and/or doors, on the other hand. Registration No. 2,815,507 includes window frames and doors and windows. Registration No. 2,510,664 includes window frames and windows. Registration No. 2,662,074 covers soffits and doors. Registration No. 2,591,349 covers window frames and doors and windows. Registration No. 2,169,432 covers soffit and windows and doors. Registration No. 2,567,611 covers vinyl soffit and vinyl windows and doors.

Registration No. 2,828,927 covers soffit and doors. Registration No. 2,549,266 covers soffits, fascia and gutters and storm doors. Registration No. 2,670,877 covers vinyl soffit and vinyl windows and vinyl doors. These registrations suggest that windows and doors and the types of building materials in registrant's registration emanate from the same source. See In re Mucky Duck Mustard Co., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) [Although third-party registrations "are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such good or services are the type which may emanate from a single source"]. See also In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1786 (TTAB 1993). Under the facts of this case, we conclude that applicant's identified building materials and registrant's windows and doors are related.

With respect to the marks, although they must be considered in their entireties, it is nevertheless the case that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that for rational reasons, more or less weight has been give to a particular feature of a mark, provided [that] the ultimate conclusion rests on

consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

The dominant feature of the registered mark is the term "K2". This term is much larger in size than the term MIKRON in the registered mark. Further, the term "K2" dominates over the mountain design and "K2" is the portion of the mark purchasers will remember and use in calling for the goods. In re Appetitio Provisions Co., Inc., 3 USPQ2d 1553 (TTAB 1987). The term "K2" in the registered mark is substantially similar to applicant's "K2" stylized mark. While the term MIKRON and the mountain design in the registered mark would be observed by purchasers, they would not lead persons to conclude that the goods come from different sources. On the contrary, persons are likely to

view the applied-for stylized mark "K2" as a variant mark of the registrant. In finding that the marks are similar, we note that the term "K2" is an arbitrary term as applied to the involved goods.

We recognize that the purchase of building materials may involve a degree of care. This, however, does not require a finding of no likelihood of confusion. Even assuming that the purchasers of these goods exercise care, this does not mean that such purchasers are immune from confusion as to the origin of the respective goods, especially when sold under similar marks. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289 (CCPA 1962); and In re Total Quality Group Inc., 51 USPQ2d 1474 (TTAB 1999).

In sum, we conclude that purchasers and potential customers, who are familiar with registrant's K2 MIKRON and design mark for its windows and doors, would be likely to believe, upon encountering applicant's "K2" stylized mark for the identified building materials, that such goods emanate from, or are sponsored by or associated with the same source.

Decision: The refusal to register under Section 2(d) with respect to both classes 6 and 19 is affirmed.